(1)

Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERALD JONES AND

THELBERT STATEN,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SUSAN G. JAMES
ATTORNEY FOR PETITIONER
LAW OFFICE OF SUSAN G. JAMES
AND ASSOCIATES
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104
334/269-3330

36 pp

QUESTIONS PRESENTED

1. Should this Court exercise its supervisory power to overturn the district court's and Eleventh Circuit Court of Appeals' erroneous application of 18 U.S.C. §3006A, the Criminal Justice Act?

2. Should this Court exercise its supervisory power to resolve a split among the federal circuits: Whether the financial resources of a criminal defendant's family or friends, over which the defendant exercises no control, should be included in determining whether a criminal defendant is "indigent" for purposes of the Criminal Justice Act?

THE PARTIES

The caption in this case contains the name of all parties.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REFERENCE TO OPINIONS DELIVERED BELOW

1. Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals

for the 11th Circuit in this case.

Opinions Below

1. The order of the Eleventh Circuit (98-6008) denying Appellants' motion for a free trial transcript on direct criminal appeal can be found as (Appendix A).

2. The order of the United States District Court for the Southern District of Alabama, requiring the Appellants' appellate counsel to pay a pro rata share of the transcript costs can be found as (Appendix B).

3. The order of the United States District Court for the Southern District of Alabama, requiring Petitioner's counsel to disclose her fee arrangements with Petitioner's family can be found as (Appendix C).

STATEMENT OF JURISDICTION

The Court of Appeals denied Appellants' motion for a free trial transcript on July 14, 1999. (See Appendix A) The order of the United States District Court was entered on February 12, 1999. (See Appendix B)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Appellants Gerald Jones (hereinafter "Jones")and Thelbert Staten (hereinafter "Staten")were indicted in June 1997 and charged with counts of conspiracy to distribute controlled substances in violation of 21 U.S.C. §846. Pretrial, Jones and Staten were granted indigent status pursuant to 18

U.S.C. §3006A and 28 U.S.C. §1915.

Jones and Staten were convicted on September 9, 1997 in the United States District Court for the Southern District of Alabama, Mobile Division, the Hon. Richard Butler presiding. Case Nos. CR-97-99-01, CR-97-99-22. Jones and Staten filed timely notices of appeal.

On February 12, 1999, the United States District Court entered an order which found that Jones' family had paid $7,500 towards Jones' appellate fee, and that Staten's family had paid $2,500[1] towards Staten's appellate fees. The Court ordered Jones and Staten's appellate counsel to pay $1,320.00 to that Court's Criminal Justice Act fund, said amount

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[1] Both Petitioner's families have since paid the entire $7,500 (each) legal fee.

being Jones and Staten's pro rata share of the cost of the trial transcript.

Jones and Staten appealed this order in a motion to the Eleventh Circuit Court of Appeals dated on or about February 26, 1999. The Eleventh Circuit denied the motion in an order dated July 14, 1999.

Reasons for Granting the Writ

The district court and Eleventh Circuit Court of Appeals have ordered the retained attorney for appellants Jones and Staten pay the pro rata share of Jones' and Staten's trial transcripts. This order has wide-reaching implications for criminal defendants. If this erroneous ruling is allowed to stand, not only will it violate the right of criminal defendants to effective assistance of counsel and access to courts as guaranteed by the U.S. Constitution, it will constitute an unlawful

taking of private property. It will have a chilling effect on the criminal defense bar, as attorneys will be discouraged from representing defendants previously determined to be indigent pursuant to the Criminal Justice Act, for fear that federal courts will attempt to force the attorneys to pay their clients' costs at the trial and appellate levels.

Jones and Staten were declared indigent and provided with court-appointed counsel at their trial. Following conviction, the families of Jones and Staten sought to employ the undersigned counsel to represent Jones and Staten in an appeal to the Eleventh Circuit Court of Appeals. Jones' family paid $7,500. Staten's family ultimately paid $7,500.

Jones and Staten contend that the district court erred in ordering Jones and

Staten's appellate counsel to personally pay $1,320.00 to that court's Criminal Justice Act fund for Jones' and Staten's pro rata share of the transcript costs.

First, the district court has no authority under the Criminal Justice Act to require the defendant's counsel to pay any costs. In so doing, the district court violated Jones and Staten's due process and equal protection rights under the U.S. Constitution, misinterpreted statutory federal law and abused its discretion.

Second, the circuits are split regarding whether the funds belonging to a defendant's family or friends, over which the defendant has no control, should be included in determining indigency status. The Eleventh Circuit holds that such funds may be included in making an indigency determination, while

the Second and Tenth Circuits hold that they may not.

ARGUMENT

1. Should this Court exercise its supervisory power to overturn the district court's and Eleventh Circuit Court of Appeals' erroneous application of 18 U.S.C. §3006A, the Criminal Justice Act?

Jones and Staten first contend that the order of the district court, and its subsequent affirmance by the Eleventh Circuit Court of Appeals, constitutes a clear abuse of discretion, as it orders Jones' and Staten's counsel to reimburse monies into the Court's Criminal Justice Act fund - which is not permitted by the plain language of the statute itself.

A. Standard of Review.

The decision whether to grant a request to proceed in forma pauperis is committed to the sound discretion of the trial court. Williams v. Estelle, 681 F.2d 946 (5th Cir. 1982); United States v. Robinson, 718 F.Supp. 1582 (M.D.Ga. 1989).

B. Statutory Authority.

18 U.S.C. §3006A(f) states in pertinent part that:

> Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation,

> current at the time of payment, to carry out the provisions of this section.

The district court's order thereby violates 18 U.S.C. §3006A(f) in that the statute's plain language does not allow the district court to order that the retained appellate attorney surrender all or part of his legal fee to pay transcripts. The district court's authority is limited to ordering the defendant to pay such costs.

In the instant case, both Jones and Staten were granted indigent status by the district court; however, after Jones' and Staten's families attempted to retain an appellate counsel, the district court ordered their appellate counsel to pay $1,320.00 to the Court's Criminal Justice Act fund. This amount constituted approximately 2/7 of the

total transcript costs (there were seven codefendants at the criminal trial).

In so doing, the district court acted outside the authority granted in 18 U.S.C. §3006A(f), and so abused its discretion. It is undisputed that when court-appointed counsel is provided, it is constitutionally permissible to require the defendant to repay the expenses incurred by the State in providing representation if the defendant later becomes able to pay. Hanson v. Passer, 13 F.3d 275, 279 (8th Cir. 1994) (emphasis added). Likewise, at or following an indigency determination, the judicial officer may inquire into the financial condition of a defendant's spouse, and if such spouse indicates that he or she is willing to pay part or all of the counsel's costs, the judicial officer may direct deposit or

reimbursement. 7 Administrative Office of the United States Courts, *Guide to Judiciary Policy and Procedures*, Appointment of Counsel in Criminal Cases, §2.06, cited in United States v. Salemme, 985 F.Supp. 197, 201 (D. Mass.1997). See also 18 U.S.C. §3006A(c),(f).

Clearly, the district court may order the defendant to reimburse all or part of the money expended by the Government pursuant to the Criminal Justice Act. However, the district court may not order the defendant's attorney to reimburse part or all of the monies expended by the Government pursuant to the Criminal Justice Act. The district court's order was outside its authority and repugnant to the purpose and intent of the Criminal Justice Act.

C. Due Process and Equal Protection

Jones and Staten's federal due process

and equal protection rights were violated by the district court's order.

As a general matter, differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. Roberts v. Lavallee, 389 U.S. 40, 42, 88 S.Ct. 194, 195-96, 19 L.Ed.2d 41 (1967); Russ v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). When the applicable statutes provide a right to appeal a criminal conviction, an indigent defendant is entitled to "as adequate appellate review as defendants who have money enough to buy the transcripts." Griffin v. Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed.2d 891 (1956).

The district court's order that Jones and Staten, alone among the seven co-defendants,

were denied free transcripts because their families paid for retained counsel on appeal violated Jones' and Staten's rights to due process and equal protection. See, e.g., Fullan v. Commissioner of Corrections of the State of New York, 891 F.2d 1007, 1011 (2nd Cir. 1989).

2. Should this Court exercise its supervisory power to resolve a split among the federal circuits: Whether the financial resources of a criminal defendant's family or friends, over which the defendant exercises no control, should be included in determining whether a criminal defendant is "indigent" for purposes of the Criminal Justice Act?

Additionally, Jones and Staten contend that there exists a split among the circuits

with regard to whether the district court is entitled to include the assets of a defendant's family or friends, over which the defendant has no control, in determining whether a defendant is entitled to be granted in forma pauper status under the Criminal Justice Act.

The district court's order in this case (Exhibit B) clearly takes such assets into account. This view was ratified by the Eleventh Circuit Court of Appeals in affirming the district court's order. See also United States v. Robinson, supra at 1583: "In determining whether a defendant is entitled to court-appointed counsel the relevant threshold inquiry is whether defendant is financially unable to obtain adequate representation, and financial inability includes an inquiry into whether there is available to defendant funds

from other sources such as family, friends, trusts, estates, or defense funds." (citing United States v. Martinez-Torres, 556 F.Supp. 1275 (S.D.N.Y. 1983).

By contrast, the Second Circuit follows the opposite holding. In Fullan v. Commissioner of Corrections of the State of New York, 891 F.2d 1007, 1011 (2nd Cir. 1989), supra, the Second Circuit addressed this precise issue: "But in the state of facts assumed here, respondents focus not on assets owned or controlled by the defendant but rather on assets belonging to his family and friends. This focus is inappropriate, for indigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant."

The Fullan Court added, "The

determinative consideration is that a state has no right to dictate how the defendants' family and friends will spend their money. Insofar as the State's prosecution of a defendant is concerned, family and friends are bystanders." Id., 891 F.2d at 1011.

The Tenth Circuit apparently is in line with the Second's Circuit's holding in Fullan. "We initially note that simply because a criminal defendant has been provided with a lawyer and posted bail due to the beneficence of his family does not, ipso fact, mean that he loses his status as an indigent." Matthews v. Price, 83 F.3d 328 (10th Cir. 1996).

In Jones and Staten's case the district court merely inquired how much the retained appellate counsel had been paid. Upon learning that Jones' and Staten's appellate counsel had been partially paid the appellate

legal fee, the district court ex mero motu ordered the appellate counsel to pay Jones' and Staten's pro rate share of the transcript. The district court failed to inquire further; specifically, the district court failed to determine whether Jones and Staten owned or controlled the funds provided by their families to their appellate counsel. The district court clearly abused its discretion in so doing. This Court should resolve the split between the circuits and adopt the bright-line rule found in Fullan, supra.

CONCLUSION

WHEREFORE, for the above-cited arguments and citations to authority, Petitioners pray that this Court will grant their Petition for Certiorari, hear the case on its merits, and grant the relief sought.

Respectfully submitted,

/s/_____
SUSAN G. JAMES
Counsel of Record

Susan G. James & Associates
600 South McDonough Street
Montgomery, Alabama 36104
(334) 269-3330

Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6008-I

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRIS LIPSCOMB,
WILMER KEITH BRECKENRIDGE, a.k.a. Sonny,
ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Alabama

BEFORE: TJOFLAT, BIRCH and CARNES, Circuit Judges.

BY THE COURT:

Appellants Jones and Straten's motion for transcripts at government expense is DENIED.

Appellants Jones and Straten's motions to file their motion for transcripts at Government expense is GRANTED.

Attorney W. Gregory Hughes' motion to withdraw as counsel for Appellant Breckenridge is DENIED WITHOUT PREJUDICE TO RENEWAL should additional counsel enter an appearance on behalf of this Appellant.

United States Court of Appeals
Eleventh Circuit
56 Forsyth St., NW
Atlanta, GA 30303

In Replying Give Number
Of Case And Names of Parties

July 14, 1999

Susan Graham James
Susan G. James & Associates
600 South McDonough Street
Montgomery, AL 36104

RE: 98-6008-I USA v. Lipscomb

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of fourteen (14) days from this date, **this appeal will be dismissed by the clerk without further notice** unless the default(s) noted below have been corrected:

Complete the transcript order form (Appeal Information Sheet) and order the transcript, as required by Fed.R.App.P. 10(b)(1); an Appeal Information Sheet is available from the district court clerk. APPELLANT IS REQUIRED TO SERVE A COPY OF PAGE 1 OF THE APPEAL INFORMATION SHEET ON ALL PARTIES AND THE CLERK OF THIS COURT AND OF THE DISTRICT COURT WHEN IT IS DELIVERED TO THE COURT REPORTER.

Make satisfactory financial arrangements for transcript preparation with the court reporter as required by Fed.R.App.P. 10(b)(4).

11th Cir. R. 46-1(d)(1) provides that "Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor either enters an appearance or is appointed under the Criminal Justice Act, and may not abandon or cease representation of a defendant except upon order of the court."

11th Cir. R. 42-1(b) also provides that "If an appellant is represented by appointed counsel, the clerk may refer the matter to the court for possible disciplinary action against counsel in lieu of dismissal."

Sincerely,

THOMAS K. KAHN, Clerk

Reply to: Michelle Shannon (404)335-6188

(nh)

This notice applies to appellant's Jones and Straten.

c: District Court Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA)

v.) CRIMINAL ACTION
NOS. 97-00099-01
97-00099-22

GERALD JONES and)
THELBERT STATEN

UNDER SEAL

Defendants.)

ORDER

Pursuant to the Court's order dated November 5, 1998, counsel for the defendant has updated information regarding attorney's fees received. Counsel states that the family of defendant Gerald Jones has paid counsel's entire $7,500 fee for representing defendant Jones on appeal and that the family of Thelbert Staten has paid $2,500 of counsel's $7,500 fee. Based on this information, the Court finds that counsel should reimburse this Court's CJA fund for a proportionate share of the cost of the

transcript. Accordingly, within thirty days of the date of this order counsel shall pay into the registry of the Court one thousand three hundred twenty and no/100ths ($1,320.00) dollars.[2] The Clerk of the Court shall apply the amount paid into Court into the CJA fund.

It is so **ORDERED**.

DONE this the 12 day of February, 1999.

/s/_____

CHIEF DISTRICT JUDGE

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[2] According to Court records, the cost of the transcript was $4,626.00 dollars. When the cost is divided among seven defendants, each defendants proportionate share is approximately $600.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
v.	)	CRIMINAL ACTION NO. 97-00099-34
THELBERT STATEN,	)	
Defendants.	)	

ORDER

This matter is before the Court on defendant's motion for a free transcript (Doc. 1332). Defendant, who proceeded *in forma pauperis*, at trial is now represented by retained counsel. According to the motion, counsel was retained by defendant's family, the family indicates that they have no funds with which to purchase the transcript and the defendant remains indigent. In order for the Court to determine whether there are sufficient funds available to pay for the transcript, it is necessary for counsel to submit, in camera, a statement of the amount she has been, or expects to be, paid by defendant's family for her services at

sentencing and on appeal and the estimated cost of the transcript. Counsel's submissions should be filed no later than August 14, 1998.

It is so **ORDERED**.

DONE this the 20th day of July, 1998.

/s/_____

CHIEF DISTRICT JUDGE

Supreme Court, U.S.
FILED
MAR 1 4 2000
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(2)

No. 99-1014

In the Supreme Court of the United States

GERALD JONES AND THELBERT STATEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel Of Record
JAMES K. ROBINSON
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney
Department Of Justice
Washington, D.C. 20530-0001
(202) 514-2217

23pp

QUESTION PRESENTED

Whether the court of appeals erred in denying petitioners' motion for a free trial transcript pursuant to 28 U.S.C. 1915 (Supp. III 1997).

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In the Supreme Court of the United States

No. 99-1014

GERALD JONES AND THELBERT STATEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 21a-22a) denying petitioners' motion for a free transcript is unreported. The order of the district court requiring counsel to reimburse the court for the transcript costs (Pet. App. 26a-27a) is also unreported.

JURISDICTION

The order of the court of appeals was entered on July 14, 1999. The petition for a writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner

Gerald Jones was convicted of conspiracy to possess cocaine with intent to distribute it, conspiracy to possess marijuana with intent to distribute it, attempted possession of marijuana with intent to distribute it, and two counts of attempted possession of cocaine with intent to distribute it, all in violation of 21 U.S.C. 846 and 841. Jones Presentence Investigation Report 7. Petitioner Thelbert Staten was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 and 841. Staten Presentence Investigation Report 7. Jones was sentenced to life imprisonment, to be followed by five years of supervised release. Jones Judgment in a Criminal Case 2-3. Staten was sentenced to 188 months of imprisonment, to be followed by five years of supervised release. Staten Judgment in a Criminal Case 2-3.

Both petitioners filed timely notices of appeal and sought to obtain free trial transcripts for use on appeal. Although the district court originally granted that request, the court ordered the appellate counsel that petitioners had retained to reimburse the court for the transcript costs upon learning that counsel had been paid $10,000 in attorneys' fees by petitioners' families. Pet. App. 26a-27a. Petitioners then moved in the court of appeals for transcripts provided at government expense. That motion was denied on July 14, 1999.

1. Petitioner Gerald Jones was the head of a large drug trafficking organization that operated in and around Uniontown, Alabama. As the leader of that organization, petitioner orchestrated the interstate transportation of multiple-kilogram shipments of marijuana and powder and crack cocaine. Jones Presentence Investigation Report 8-9, 15-16. Petitioner Thelbert Celester Staten became involved in the drug trafficking organization in the early 1990s. He obtained

kilogram quantities of crack cocaine from Jones and another source and distributed those drugs in the Uniontown area. Staten Presentence Investigation Report 17.

2. Petitioners and 35 others were charged in a 75-count superseding indictment with drug and weapons offenses. Jones Presentence Investigation Report 7; Staten Presentence Investigation Report 7. After judgment was entered on their convictions, petitioners appealed. Through appellate counsel retained by their families, petitioners moved in the district court to obtain trial transcripts at government expense. In support of those motions, each petitioner submitted an affidavit attesting to his own indigency, and a pleading signed by counsel averring that, although petitioner's relatives were willing to pay her fees, they denied having "any funds whatsoever to purchase the transcript." Staten Motion Requesting Declaration of Appellant as Indigent for Free Transcript 2 (filed July 9, 1998); Jones Motion Requesting Declaration of Appellant as Indigent for Free Transcript 1 (filed July 10, 1998).

On July 20, 1998, the district court ordered counsel to submit, *in camera*, "a statement of the amount she has been, or expects to be, paid by defendant's family for her services at sentencing and on appeal and the estimated cost of the transcript." Pet. App. 29a-30a. The court indicated that it needed that information "to determine whether there are sufficient funds available to pay for the transcript." *Id.* at 29a. Petitioners' counsel then notified the court that each family had agreed to pay her $7,500 for her services at sentencing and on appeal, but that no money had yet been received from either family. Staten Response to the Court's

Order of July 20, 1998, at 1; Jones Response to the Court's Order of July 20, 1998, at 1.

On November 5, 1998, the district court issued an order finding that "counsel's fee is sufficient to require defendants to bear a proportionate share of the cost of the transcript." 11/5/98 Order 1 (*reprinted in* App. A, *infra*, 2a). Nonetheless, the court granted the motion for a free transcript "at this time," because counsel had not yet been paid for her services. *Ibid.* Counsel was ordered to file supplemental information regarding payment of her fee at which time "the Court will reexamine whether counsel should be required to reimburse this Court's CJA fund for a proportionate share of the cost of the transcript." *Ibid.*

Subsequently, counsel notified the court that she had received $7,500 from Jones's family, and $2,500 from Staten's family.[1] Upon receipt of that information, the district court issued an order on February 12, 1999, requiring counsel, within 30 days, to reimburse the court's Criminal Justice Act fund $1,320 to cover petitioners' proportionate share of the transcript cost. Pet. App. 26a-27a.[2] That order was stayed by the district court on August 19, 1999. App. B, *infra*, 3a.

3. On February 26, 1999, petitioners moved in the court of appeals for a free transcript on appeal pursuant to 28 U.S.C. 1915 (Supp. III 1997). App. C, *infra*, 4a-10a.[3] On July 14, 1999, the court of appeals denied the

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[1] Counsel has since received an additional $5,000 from Staten's family, which brings her total receipts from petitioners to $15,000. See Pet. 4 n.1.

[2] Although the proceedings in the district court relating to the trial transcript were originally filed under seal, they were unsealed by the district court on February 7, 2000.

[3] That motion was unsealed by the Eleventh Circuit on February 14, 2000.

motion without explanation. Pet. App. 21a. At the same time, the court of appeals notified petitioners' counsel that the appeal would be dismissed within fourteen days unless she ordered the transcript as required under Federal Rule of Appellate Procedure 10(b)(1). Petitioners' counsel did not order the transcript, but filed this petition for a writ of certiorari. Petitioners then moved successfully to stay the appeal pending resolution of their petition. App. D, *infra*, 11a.

ARGUMENT

Petitioners contend (Pet. 8) that the court of appeals "affirm[ed]" the district court's order requiring their counsel to reimburse the court for the cost of their trial transcripts. Petitioners claim (Pet. 8-12, 14-18) that this purported holding is inconsistent with the Criminal Justice Act of 1964 (CJA), 18 U.S.C. 3006A (1994 & Supp. IV 1998), and violates their rights to due process and equal protection (Pet. 12-14). Those claims are not properly before this Court: petitioners did not rely on the Criminal Justice Act in the court of appeals, and the court of appeals did not construe that Act. Further, the court of appeals did not "affirm" the district court's order requiring counsel to reimburse the court for the cost of the trial transcripts. Accordingly, the petition should be denied.

1. Federal Rule of Appellate Procedure 10(b)(1) provides that "[w]ithin 10 days after filing the notice of appeal * * * , the appellant must * * * order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to a local rule of the court of appeals." Federal Rule of Appellate Procedure 10(b)(4) provides that, "[a]t the time of ordering, a party must make satisfactory arrangements with the reporter for pay-

ment of the cost of the transcript." "[I]f the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order [requesting the transcript] shall so state." Fed. R. App. P. 10(b)(1).

The Criminal Justice Act of 1964, 18 U.S.C. 3006A (1994 & Supp. IV 1998), requires each United States district court to adopt a plan for furnishing legal representation to persons who are financially unable to obtain adequate representation on their own. See 18 U.S.C. 3006A(a). Under the CJA, an indigent defendant with court-appointed counsel may obtain a trial transcript at government expense if he wishes to appeal. See 18 U.S.C. 3006A(d)(7) (Supp. IV 1998) ("If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28."); 28 U.S.C. 753 ("Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A) * * * shall be paid by the United States out of moneys appropriated for those purposes.").

The CJA, however, does not expressly permit the court to provide transcripts at government expense to defendants represented by retained counsel. Cf. *Miller* v. *Smith*, 115 F.3d 1136 (4th Cir.) (en banc) (upholding constitutionality of state law denying transcript to indigent defendant represented by private counsel), cert. denied, 522 U.S. 884 (1997).

Even assuming that the CJA allows defendants like petitioners who are represented by retained counsel to obtain transcripts at government expense, petitioners did not ask the court of appeals to grant them a free transcript under the CJA. Instead, petitioners asked

the court of appeals to provide them a free transcript under 28 U.S.C. 1915 (Supp. III 1997), a statute that contains an alternative procedure whereby an indigent defendant may obtain a trial transcript at no expense. App. C, *infra*, 6a.[4] Thus, contrary to petitioners' claim (Pet. ii, 8-12, 14-18), the order of the court of appeals presents no issues regarding the interpretation and application of the CJA.[5]

2. Nor does the petition present any other issue that warrants this Court's review. Petitioners urge (Pet. 12-14) this Court to determine whether the district court's February 12, 1999, order, which required their counsel to reimburse the CJA fund for the transcript costs, violates their constitutional rights. The record, however, does not establish that the court of appeals ruled on the propriety of that order.

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[4] Section 1915 allows the court to authorize the commencement of a criminal appeal by a person who has filed an affidavit attesting to his indigency. 28 U.S.C. 1915(a)(1) (Supp. III 1997). Upon the filing of the appropriate affidavit, the court may direct the United States to bear the expense of preparing a trial transcript. 28 U.S.C. 1915(c) (Supp. III 1997). When the defendant proceeds under Section 1915 instead of the CJA, 28 U.S.C. 753(f) requires a judge to certify that "the appeal is not frivolous (but presents a substantial question)" before the court may order the government to pay for the transcript. See 98-6008-I Motion for Free Transcript 3, *reprinted in* App. C, *infra*, 6a (arguing that appeal is not frivolous). No such certification was made in this case.

[5] Although petitioners now argue that the plain language of 18 U.S.C. 3006A(f) precludes the district court from ordering retained counsel to pay for the trial transcripts (Pet. 8-12), and that the CJA precludes consideration of the assets of a defendant's family in determining whether a defendant is indigent under the CJA (Pet. 14-18), petitioners raised neither argument in the court of appeals. Indeed, they did not cite the CJA in their Motion for Free Transcript. See App. C, *infra*, 4a-8a.

The court of appeals simply declined to require the government to pay for petitioners' trial transcripts; its order nowhere references, much less purports to affirm, any district court order. The court of appeals may have declined to order the government to pay for the transcripts because the district court had (on November 5, 1998) already ordered that the transcripts be provided at government expense. See App. A, *infra*, 2a. Alternatively, the court of appeals may have concluded that petitioners were not entitled to free transcripts under 28 U.S.C. 1915 (Supp. III 1997) because they had not secured the necessary certifications that their appeals present a substantial question. See n.4, *supra*; 28 U.S.C. 753(f).

Although petitioners contend (Pet. 5) that they "appealed" the district court's order requiring their counsel to reimburse the transcript costs, the record does not support that claim. Petitioners' motion asked the court of appeals to award them a free transcript under 28 U.S.C. 1915 (Supp. III 1997). App. C, *infra*, 6a. Although petitioners argued that the district court's reimbursement order was "unfair and inappropriate," *id.* at 8a, they never argued that the district court had violated its authority under the CJA or any other statute or had acted unconstitutionally in ordering reimbursement. The order of the court of appeals does not refer to the district court's order. Accordingly, there is no reason to conclude that the court of appeals passed on the legality of the district court's order in denying petitioners' motion, under 28 U.S.C. 1915 (Supp. III 1997), for a free transcript on appeal.[6]

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[6] Even if the court of appeals understood petitioners to seek review of the district court's order, the court of appeals might well have concluded that it lacked jurisdiction to review that order by

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney

MARCH 2000

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motion. Federal Rule of Appellate Procedure 24 allows appellate review by motion of a district court order denying a criminal defendant *in forma pauperis* status on appeal, but the district court did not enter any order denying IFP status in this case. Indeed, the district court's November 5, 1998, order granted petitioners' request for a free transcript on appeal. App. A, *infra*, 2a. Accordingly, there is a strong argument that the district court's later order requiring counsel to reimburse the CJA fund may be reviewed only by appeal, not by motion. Petitioners did not file a notice of appeal from the district court's reimbursement order.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CRIMINAL ACTION NO. 97-00099-CB

UNDER SEAL

UNITED STATES OF AMERICA,

v.

GERALD L. JONES AND
THELBERT STATEN, DEFENDANTS.

[Filed: Nov. 5, 1998]

ORDER

This matter is before the Court on the *in camera* responses to the Court's order of July 20, 1998, requiring defendant's attorney to disclose information regarding her fee arrangements with the above-named defendants. The purpose of this information was to allow the Court to determine whether the defendant's [sic] should be permitted to obtain a free transcript. Based on the financial information provided by the defendants, it appears that each of the defendants is indigent. According to counsel's response, she has agreed to represent each defendant at sentencing and

on appeal for a fee of $7,500 each. Counsel states that the defendants' family members have made fee arrangements with her, but that she had [sic] not yet received any money from either defendant toward her fee and did not expect to receive any payment before the appellate brief was filed.

The Court is also of the opinion that counsel's fee is sufficient to require defendants to bear a proportionate share of the cost of the transcript. However, because counsel avers that she has not yet been paid for her services, and it appears that there is no set time for payment, the Court finds it necessary to GRANT the motion for a free transcript at this time. Upon filing of the appellate briefs, counsel shall supplement her *in camera* response to the Court with information regarding the status of her fee. At that time the Court will reexamine whether counsel should be required to reimburse this Court's CJA fund for a proportionate share of the cost of the transcript.

DONE and ORDERED this the 5th day of November, 1998.

/s/ CHARLES R. BUTLER, JR.
CHARLES R. BUTLER, JR.
CHIEF DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

CRIMINAL ACTION NO. 97-00099-001/034

UNITED STATES OF AMERICA,

vs.

GERALD JONES &
THELBERT STATEN

[Date: Aug. 19, 1999]

NOTICE OF RULING

TO: ALL COUNSEL OF RECORD

You are advised that on the 19 day of August, 1999, the following action was taken in the above styled case by Honorable Charles R. Butler, Jr., CHIEF, UNITED STATES DISTRICT JUDGE

RENEWED MOTION TO STAY PAYMENT OF TRANSCRIPT FEE—endorsed—GRANTED.

DEBORAH S. HUNT, CLERK

By: /s/ NETTIE PENDLETON
NETTIE PENDLETON
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. _____
DC # CR-97-99-01
CR-97-99-22

(Under seal)

UNITED STATES OF AMERICA,
PLAINTIFF/APPELLEE

v.

GERALD JONES AND
THELBERT STATEN, DEFENDANTS/APPELLANTS.

[Filed: Feb. 26, 1999]

MOTION FOR FREE TRANSCRIPT

COME NOW Defendants/Appellants Gerald Jones and Thelbert Staten, by and through the undersigned counsel, and hereby move this Court for an order granting them free transcripts on appeal, and as grounds therefore would show this Court as follows:

1. The above-named defendants were convicted in the above-styled case before the United States District Court for the Southern District of Alabama, CR-97-99-01 and CR-97-99-22.

2. The defendants were granted in forma pauperis status for their trial.

3. On appeal, the families of the above-named defendants retained the undersigned counsel. The undersigned counsel agreed to represent both defendants at sentencing and on appeal for $7,500 apiece, which is substantially less than the undersigned counsel's customary fee and represents an economic detriment to the undersigned counsel.

4. Defendant Gerald Jones' family has paid Jones' $7,500 fee. Defendant Staten's family has paid approximately $2,500 of his $7,500 fee. The undersigned counsel does not anticipate any additional monies forthcoming from Staten's family or Staten himself.

5. In an order dated February 12, 1999, the United States District Court for the Southern District of Alabama ordered the undersigned counsel to pay $1,320.00 (One thousand, three hundred and twenty dollars), to the Court's CJA fund, said amount apparently being a two-sevenths pro rata share of the transcript's cost. A copy of said order is attached hereto as Exhibit A.

6. Jones and Staten remain indigent, despite their families' partial payments towards the undersigned counsel's legal fee.

7. Jones' and Staten's appeals are not frivolous and are not taken for the purposes of delay. Jones received a sentence of life imprisonment without the possibility of parole, and Staten received a lengthy non-parolable sentence.

8. 28 U.S.C. §1915 authorizes any court of the United States to allow indigent persons to prosecute, defend, or appeal suits without prepayment of costs. All persons convicted of crimes in the United States district court have the right to appeal the conviction to the Court of Appeals, provided that he meets the statutory requirements of filing a timely notice of appeal and designating the transcript, the record on appeal, and filing the appellate briefs.

9. A defendant who is indigent, or unable to pay the costs of an appeal may apply in the district court in which he is convicted for leave to appeal in forma pauperis, provided that the appeal is taken in good faith. 28 U.S.C. § 1915. "Good faith," in this context, is demonstrated when the defendant seeks appellate review of any issue which is not frivolous. *Coppedge v. United States*, 369 U.S. 438, 445, 82 S. Ct. 917, 921, 8 L.Ed.2d 21 (1962). In the current case, the district court did not find that Jones' and Staten's appeals were in bad faith.

10. The Eleventh Circuit has held that in forma pauperis status should be evaluated on a case-by-case basis. *Cofield v. Alabama Public Service Commission*, 936 F.2d 512, 519 (11th Cir. 1991). The facts of Jones' and Staten's financial status are not in dispute. Indigency affidavits were prepared before and after trial and no finding has been made that either defendant has

the financial resources to hire counsel or pay for a transcript. The presentence reports for both defendants note each defendant's indigency. Both the Jones family and the Staten family have advised the undersigned counsel that they are financially unable to pay for the costs of a transcript.

11. In the instant case, Jones and Straten were indigent and were granted in forma pauperis status for their trial. Whether the defendant has assets is critical to a determination of indigency. *Sellers v. United States*, 881 F.2d 1061 (11th Cir. 1989).

12. The fact that the defendants' families were able to pay a portion of the undersigned counsel's fee does not defeat a finding of indigence. First, as noted above, Jones and Staten did not pay the portion of the undersigned counsel's fees. Jones' and Staten's families did. Second, one need not be absolutely destitute to enjoy the benefit of proceeding in forma pauperis. An affidavit to proceed in forma pauperis is sufficient if it states that one cannot, because of poverty, afford to pay for the costs of litigation and still provide for himself/herself and any dependents. See, e.g., *Jones v. Texas*, 893 F. Supp. 643, 646 (E.D. Tex. 1995) (citing *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 69 S. Ct. 85, 93 L.Ed. 43 (1948).

13. In the instant case, Jones and Staten were granted in forma pauperis status for trial. Jones was unable to pay the undersigned counsel's $7,500 fee, so Jones' relatives paid the $7,500. Staten was unable to pay the $7,500, so Staten's relatives paid $2,500 towards Staten's sentencing and appellate costs. The under-

signed counsel does not anticipate additional or forthcoming monies from Staten's family.

14. The undersigned counsel agreed to represent Jones and Staten for $15,000 for the pair, which represented an economic detriment to the undersigned counsel. Collectively, Jones' and Staten's families have paid the undersigned only $10,000 of the $15,000 total, which represents an additional economic detriment to the undersigned. Requiring the undersigned counsel to pay the CJA fund $1,320 for a pro rata share of Jones' and Staten's transcripts represents an additional and unwarranted economic detriment on the undersigned counsel. Further the undersigned counsel's representation of Jones and Staten never contemplated the undersigned counsel's paying any transcript costs. The district court's order requiring the undersigned counsel to pay a portion of the transcript costs for indigent clients is unfair and inappropriate.

15. WHEREFORE, for the above-cited reasons and citations to authority, the undersigned counsel prays that this Court will enter an order reversing the district court's order requiring the undersigned counsel to pay $1,320 to the CJA fund for the United States District Court for the Southern District of Alabama, and order that said transcripts be provided to the defendant/appellants for free.

Respectfully submitted this 26th day of February, 1999.

/s/ SUSAN G. JAMES
SUSAN G. JAMES
Alabama Bar No. JAM012
Counsel for Appellants

Address of Counsel:

Law Office of
Susan G. James & Associates
600 S. McDonough St.
Montgomery, AL 36104
334/269-3330

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing was served upon AUSA Gloria Bedwell, 169 Dauphin St., Suite 200, Mobile, AL 36602, by first-class mail, postage prepaid, this 26th day of February, 1999.

/s/ SUSAN G. JAMES
SUSAN G. JAMES
Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. _____
DC # CR-97-99-01
CR-97-99-22

(Under seal)

UNITED STATES OF AMERICA,
PLAINTIFF/APPELLEE

v.

GERALD JONES AND
THELBERT STATEN, DEFENDANTS/APPELLANTS.

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 26.1, Appellants Gerald Jones and Thelbert Staten herewith submit this Certificate of Interested Persons and Corporate Disclosure Statement.

1. Gloria Bedwell, AUSA
2. Hon. Charles Butler, United States District Judge
3. Susan G. James, Esq., Appellate Counsel
4. Gerald Jones, Appellant
5. Thelbert Staten, Appellant

/s/ SUSAN G. JAMES
SUSAN G. JAMES
Of Counsel

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6008-I

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

CHRIS LIPSCOMB, WILMER KEITH BRECKENRIDGE, a.k.a SONNY, ET AL.,
Defendants, Appellants

On Appeal from the United States District Court
for the Southern District of Alabama

[Filed: Jan. 21, 2000]

ORDER

Attorney Susan James' motion to stay this appeal pending resolution of her petition for *certiorari* to the Supreme Court is GRANTED. Ms. James is directed to file status reports on the fifteenth of every month, beginning January 15, 2000.

/s/ signature illegible
UNITED STATES CIRCUIT JUDGE